

SERVED: September 10, 2007

NTSB Order No. EA-5312

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of September, 2007

_____)	
APPLICATION OF)	
)	
CHARLES RIGGS)	
)	
)	Docket 322-EAJA-SE-17767
For an award of attorney)	
fees and expenses under the)	
Equal Access to Justice Act)	
)	
_____)	

ORDER DENYING RECONSIDERATION

Applicant¹ seeks reconsideration of our decision, NTSB Order No. EA-5272, served March 9, 2007.² In that decision, we dismissed his appeal of the law judge's order denying his application for recovery of fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA), for lack of a timely appeal brief. We found that applicant did not provide good cause for his untimely filing.

¹ Applicant styles his pleading as a motion for reconsideration. Section 821.50 provides for a petition for reconsideration. We refer to applicant's motion as a petition for reconsideration.

² A copy of the order is attached.

Title 49 C.F.R. § 821.48(a) states that an appeal must be perfected within 30 days after the date on which the written initial decision or appealable order was served, and that the Board may dismiss an appeal where a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.³ But the Board cannot entertain untimely appeal briefs without a showing of good cause for the delay.⁴ Title 49 C.F.R. § 821.10 provides the standard for computing time for deadlines in the Board's Rules of Practice. We find that applicant has not demonstrated good cause for the delay in filing his appeal brief, and therefore deny his petition for reconsideration.

Unfounded mistakes as to procedures or miscalculation of filing deadlines do not justify acceptance of untimely appeal briefs, nor do they constitute good cause for noncompliance.⁵ And, absent a showing the appeal brief could not have been filed sooner, risk of miscalculation is borne by the party who delays filing until the last minute.⁶

In his petition requesting reconsideration of our dismissal of this appeal, counsel states that he erroneously calculated the 30-day period from the date of his notice of appeal rather than from the date of the written decision. He requests, based on his "excusable neglect," that we accept the appeal brief and consider the application on its merits.

The Administrator contests applicant's arguments, urging us to deny the petition for reconsideration, and arguing that applicant has not exercised due diligence. Adm. Br. at 2. The Administrator also argues that applicant has not shown he was unable to request an extension of time to file a brief, citing Kuhn v. Administrator, NTSB Order No. EA-3838 at n.1 (1993), and

³ Although the Board has separate rules implementing EAJA (see 49 C.F.R. Part 826), the Board's usual Rules of Practice (see 49 C.F.R. Part 821) supersede and apply to proceedings dealing with appealable orders. See 49 C.F.R. § 826.31.

⁴ See 49 C.F.R. § 821.11(a); Administrator v. Hooper, 6 NTSB 559, 560 (1988).

⁵ Administrator v. Smith, NTSB Order No. EA-4485 (1996); Administrator v. Near, 5 NTSB 994 (1986); Administrator v. Uhre, 6 NTSB 985 (1989).

⁶ Administrator v. Royal American Airways, 5 NTSB 1089 (1986).

that applicant offered no evidence to establish inability to notify the Board or the Administrator regarding his incapacity. Id. at 3.

We agree that applicant has not shown due diligence in prosecuting his appeal. Miscalculation of filing deadlines has long been held not to constitute good cause for accepting late-filed pleadings.⁷ Counsel states that he suffered injury on December 28, 2006, and was incapable of practicing law until January 25, 2007. But, as the Administrator points out, counsel filed a brief on January 8, 2007, which impugns his argument that he was unable to practice until January 25. Furthermore, according to the record before us,⁸ applicant's counsel apparently had the capacity to file a brief beginning on November 30, 2006, until his injury on December 28, 2006. The risk of waiting until the last minute to file a pleading is borne by the dilatory party.⁹

ACCORDINGLY, IT IS ORDERED THAT:

Applicant's petition for reconsideration is denied.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above order.

⁷ See Smith, supra; Near, supra; Uhre, supra.

⁸ Language in a pleading does not constitute evidence. Because applicant has presented no evidence to support his petition, there is no evidence by which to measure whether there has been a showing of good cause for the delay. Based on the rationale in this opinion, however, we doubt that evidence as to counsel's injuries and incapacitation would affect the result here. We are familiar with petitioner's counsel; he is a veteran aviation law attorney. His averment of miscalculation of the time period for filing an appeal brief, in light of the clear language of the rule, is unavailing.

⁹ See Royal American Airways, supra.